

January 7, 1999
L-99-2

TO : Dale G. Zimmerman
Director of Hearings and Appeals

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Appeal of H. A. N., R.R.B. No. A
Last Person Employment - Identity of Employer

This is in reply to your memorandum of December 7, 1998, regarding the appeal of Mr. H. A. N. The hearings officer decided that appeal July 7, 1998, holding that Mr. N. and Mrs. E. N. were overpaid \$11,301.83 and \$6,646.69, respectively (\$3,020.69 of Mrs. N.'s overpayment of \$6,646.69 was waived).

The overpayment was based on a finding that Mr. N. engaged in last person employment. His annuity beginning date was February 1, 1990. The hearings officer found that Mr. N. worked for his last pre-retirement employer from 1988-1990, and then again starting in 1993. The identity of the employer is not clear from the hearings officer's opinion, but the same employer identification number was used for reporting Mr. N.'s earnings for both periods.

Information obtained after the decision was issued shows that Mr. N. worked for Lee Roberts Company, a sole proprietorship, 1988-1990, and worked for Relam, Inc., starting in 1993. These companies were both owned by Mr. Marvin L. Roberts. In both cases Mr. N. was paid through a third company, referred to as Aa third party employee leasing company@ by Mr. Roberts, which accounts for the employer identification number being the same in both cases.

You inquire whether Relam and Lee Roberts are different persons for the purposes of applying the last person employment provision of the Railroad Retirement Act (section 2(f)(6)). You state that if we agree that the two enterprises are different persons, you will reopen the hearings officer's decision.

Section 2(f)(6) of the Railroad Retirement Act provides in pertinent part that:

(A) Except as provided in subparagraph (B) -

(i) that portion of the annuity for any month of an individual as is computed

under section 3(b) of this title and as adjusted under section 3(g), plus any supplemental amount for such month under section 3(e), and that portion of the annuity for any month of a spouse as is computed under section 4(b) of this title and as adjusted under section 4(d) of this title, shall each be subject to a deduction of \$1 for each \$2 of compensation received by such individual from compensated service rendered in such month to the last person, or persons, by whom such individual was employed before the date on which the annuity of such individual under subsection (a)(1) began to accrue; and

(ii) that portion of the annuity for any month of a spouse as is computed under section 4(b) of this title and as adjusted under section 4(d) of this title shall be subject to a deduction of \$1 for each \$2 of compensation received by such spouse from compensated service rendered in such month to the last person, or persons, by whom such spouse was employed before the date on which the annuity of such spouse under subsection (c)(1) began to accrue.

(B) Any deductions imposed by this subdivision for any month shall not exceed 50 percent of the annuity amount for such month to which such deductions apply.

In our opinion, the two employers of Mr. N. are different persons for the purpose of the application of the above-quoted provision. The two enterprises are clearly separate legal entities: Lee Roberts Company is a sole proprietorship, which means that Mr. Marvin L. Roberts was Mr. N.'s employer 1988-1990, and Relam, Inc., is a corporation, which means that Relam, Inc., was his employer starting in 1993. It is not relevant to this determination that Relam, Inc., is owned by Mr. Marvin L. Roberts. Although the employer identification number being the same in both cases creates a presumption that the two companies are the same person, that presumption is rebutted by Mr. Roberts's explanation.